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IN THE

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 30

OCTOBER TERM, 1968

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SKIPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

MOTION TO AFFIRM.

PAUL W. PREISLER,
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St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CHestnut 1-4477.

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No. .....

OCTOBER TERM, 1967.

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

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Appellants,

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Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the United States Supreme Court, move the Court to affirm the final judgment and decree sought to be reviewed on appeal on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE.

The "Statement of the Case" by Appellants, Secretary of State Kirkpatrick and Attorney General Anderson of Missouri, is adopted, with exception being taken to their inclusion of several statements as facts which are argumentative and controversial. The "Statement of the Case" by Appellants Heinkel et al., is, in general, unacceptable in that it is principally argumentative.

Some statements of Appellants, Secretary of State and Attorney General of Missouri, to which exception is taken, are incomplete and are presented in a manner which may result in many misleading impressions, interpretations, and implications.

For example, all of the discussion of the matters to which the General Assembly (the Legislature) gave consideration in making the districts is pure speculation, since there is no record taken of the debates in either House nor in their districting committees. Testimony before the court by legislative leaders to which reference is made as "uncontroverted" and factual, actually represents only the respective opinion of each of only 4 members of a legislative body of 163 representatives and 34 senators.

Another example is the inclusion of the table of incorrectly calculated district population figures, apparently stated as an excuse for the enactment of an unconstitutional and invalid districting Act.

Another example is the inclusion of the percentage variation of the district populations from the "ideal" or average which tends to make the population differences between districts appear of lesser value and lesser importance.

Populations of districts should be compared to each other; people vote, percentages do not vote.

But for the improper inclusions of such matters as the foregoing in the "Statement of the Case", Appellees would not discuss same under this heading; these points will be discussed under "Argument".

ARGUMENT.

All of the "Questions Presented" by both groups of Appellants in their respective "Jurisdictional Statements" are unsubstantial.

The several "Questions Presented" by Appellants, James C. Kirkpatrick, Secretary of State of Missouri and Norman C. Anderson, Attorney General of Missouri, as stated on pages 3 through 5 of their "Jurisdictional Statement", will be considered first.

The same general questions are presented by Appellants, Heinkel et al., in their separate "Jurisdictional Statement" and the same arguments of Appellees apply to their questions respectively. These Appellants present an additional question which will be discussed following the discussion of the above questions.

The opinion, decision and judgment of the three-judge District Court extensively and adequately present and discuss the law as applied to the facts of the instant case and the court reaches the correct and appropriate determination and disposition of the issues in deciding that the congressional representative districts of Missouri as set forth in the 1967 Redistricting Act (Sections 128.203 through 128.305, Revised Statutes of Missouri, Cumulative Supplement 1967) are unconstitutional and void for violation of Article I, Section 2 of the United States Constitution.

The "Questions Presented" by Appellants Kirkpatrick and Anderson are unsubstantial.

The **first question presented** (numbered 1) by these Appellants, that the court erroneously misconstrued **Wesberry v. Sanders**, 376 U. S. 1 (1964), by finding that a districting plan would be unconstitutional if there were

any other plan with smaller variations proposed to the Legislature or to the court, is a misunderstanding by Appellants of the court's construction of the districting Act. An adopted plan of the Legislature which is constitutionally valid would not be subject to judicial attack. Alternative proposed plans, because of the Legislature's inherent discretion of selection, could not be the basis of invalidation of an otherwise valid act.

Judge Collinson in his concurring opinion so aptly states on page 97 of "Appendices to Jurisdictional Statement" of the Appellants:

> "No one can believe or contend that the Supreme Court has said that the 'one-man one-vote' doctrine requires that Congressional districts be exactly equal in population; certainly the majority opinion does not so state. But neither has the Supreme Court said that there is a mathematical formula for inequality (within a certain percentage) which will satisfy the 'nearly equal as practicable' rule."

and on page 98,

> "I do not condemn the 1967 Act because there were more equal plans defeated in the Legislature; nor do I condemn it because it divides St. Louis County between a number of districts. I believe **the plan is unconstitutional because on its face and under the undisputed evidence it is not an attempt to divide the State of Missouri in Congressional districts that are as nearly equal in population as is practicable.** And this **for the reason that it is obvious that entire counties can be moved to adjoining districts with a resulting substantial decrease in the variances of population in the present Act** and because **there is no evidence in this record that can be said to explain or justify why this was not done.**" (Emphasis supplied.)

This first question presented is unsubstantial for the above reason and others to be found in the opinion, decisions, and judgment of the court. (See map in Appendix to this Motion to Affirm.)

Under section 1. of "The Questions Are Substantial" on page 10 of the "Jurisdictional Statement" of Appellants, the majority opinion is **incompletely quoted** by Appellants, as follows:

> "The majority opinion of the court in the case on appeal finds that the population requirements of Article I, Section 2, of the Constitution have not been met in a congressional redistricting plan if the population variations between the districts are '* * * greater than those that would have been created by better plans in fact presented to but rejected by a legislature or those created by similar plans that may be presented to a court in the trial of an apportionment case. * * *.'"

The **full quotation** of the majority opinion is found on page 12 of "Appendices of Jurisdictional Statement" and reads as follows:

> "We believe that the Supreme Court's reversal in **Kilgarlin v. Hill** [386 U. S. 120], is at least an implicit rejection of any notion that the judicial use accorded the phrase '*de minimis*' can be converted into either an exception to the burden of proof rule so recently established by the Supreme Court in apportionment cases or as an independent defense that **may, without proof, be said to justify variances** greater than those that would have been created by better plans in fact presented to but rejected by a legislature or those created by similar plans that may be presented to a court in the trial of an apportionment case." (Emphasis supplied.)

This unfortunate omission is brought to the Court's attention because of the possible misinterpretation that might otherwise be made of the opinion, decision, and judgment of the court below.

The **second question presented** (numbered 2), which states that the court's opinion, decision, and judgment is in conflict with several cited cases because it rejects the principle that population variations between districts which are "de minimis" are constitutionally permissible, is an erroneous statement of the court's interpretation of the cases and of the term "de minimis".

This question is unsubstantial because there are such large population variations between adjacent districts (for example, 25,802 between the 8th and 4th districts and 21,655 between the 8th and 10th; see Appendix A) which cannot be considered "de minimis" when lesser variations could have easily been attained through the transfer of large population counties between adjacent districts which an examination of the map and the table of district populations (Appendix A of "Appellees' Motion to Affirm") will readily reveal.

The **third question presented** (numbered 3) contending that there are so called "minor variations" between the districts is unsubstantial, when there exist such great differences between districts of 25,802 and 21,655 which could have easily been greatly diminished by the transfer of whole counties even as large as 10,000 from the higher population to the lower population districts (see map, Appendix A of "Appellees' Motion to Affirm").

The **fourth question presented** (numbered 4) contending that the authority of **Connor v. Johnson**, Civ. No. 3830, S. D. Miss., was "erroneously rejected in the opinion, decision and judgment of the court" is unsubstantial because the court correctly interpreted the inapplicability

of the Mississippi case to the Missouri situation. (See page 65 of Appellants' "Appendices to Jurisdictional Statement".) The **only** question presented in the Mississippi case on the appeal of the case to the Supreme Court of the United States (October Term, No. 999. Affirmed, March 27, 1967, 386 U. S. 483) precisely and only the following issue:

> "Whether the congressional district lines drawn by the 1966 session of the Mississippi legislature, which, deliberately or otherwise, have a racially discriminatory effect, violate the Fourteenth and Fifteenth Amendments to the U. S. Constitution."

The population of the districts is not "fairly comprised" in this statement.

The **fifth question presented** (numbered 5) contends that the decision allows no legislative interplay, no variation from absolute mathematical equality between districts, and renders nugatory considerations other than population. At no time during the entire proceedings of this case, do Appellees question the authority of the Legislature to consider any factors they may deem desirable in making districts. Appellees are only interested in the population conforming to constitutional standards. The court has declared on page 9 of "Appendices to Jurisdictional Statement",

> "The principle is firmly settled that the proponents of a redistricting plan must sustain the burden of justifying **any** deviation from practicable equality of population (citing cases). This Court must also follow and apply **Kilgarlin v. Hill's** express requirement that before a particular plan may be approved as constitutional the District Court must be able, from the evidence adduced by the defendant, to articulate legally acceptable reasons for the specific variations in population between districts that have been shown to ex-

ceed the 'as nearly as is practicable' standard of Art. I, § 2."

Therefore, the fifth question presented is unsubstantial.

The **sixth question presented** (numbered 6) contends that some conclusions of the Court were based on inaccuracies in the "Findings of Fact". Appellees contend that, if Appellants considered that the inaccuracies of the District Court complained of were of such magnitude that the inaccuracies might have even remotely affected the conclusions of the court or that the court may have based its conclusion on inaccurate data, Appellants could have and should have brought their claims to the District Court through a motion for a rehearing of the cause before the District Court. Therefore, the sixth question presented is unsubstantial.

The **seventh question presented** (numbered 7) contends that the court erroneously found that the 1967 Missouri Congressional Redistricting Act does not comply with Article I, Section 2, of the Constitution of the United States. The question is unsubstantial because the districts could have easily and readily been made more nearly equal in population by the simple transfer of whole counties or smaller established political units in the more populous areas, from one adjacent district to another, and by a few such transfers greatly lower the population variances. Population variances of 25,802 are not "minor" as termed by the Appellants when much lower variances could have been obtained by a few such transfers as shown on the face of the map.

Nor should the rights of a citizen be abridged for political expediency. The court on page 16 of the "Appendices to Jurisdictional Statement" states:

> "... since **Wesberry v. Sanders** no State legislature in the United States can unnecessarily abridge one's

right to an equal vote in a congressional election any more than it may constitutionally deny one his right to trial by jury, his right of free speech, his right to freedom of religion, his right of peaceful assemblage, or any one of his many other rights guaranteed by the Constitution of the United States."

The "Questions Presented" by Appellants Heinkel et al., are unsubstantial.

The same arguments as made above apply to the second, third, and fourth "Questions Presented" by these Appellants.

The **first question presented**, by these Appellants, Heinkel, et al., is unsubstantial.

Differences in population between adjacent districts of as great as 25,802 (4th and 8th Districts), when whole counties of about 10,000 population could easily have been transferred from the higher district to the lower to make the variation much less, are unconstitutional and void for violation of Article I, § 2 of the United States Constitution.

The inclusion of the official census figures for military personnel of Fort Leonard Wood, the State Capitol at Jefferson City, and students at the Missouri University in the county populations, and hence in the Eighth District population, is valid and cannot be used as an excuse for diminishing the population excess of the Eighth District. A similar population inclusion was presented in **Davis v. Mann**, 377 U. S. 678 (1964) and upheld. (See "Appendices to Jurisdictional Statement" of Appellants, pages 46 and 47.)

The **fifth question presented** (numbered 5) of the Appellants, Heinkel, et al., on page 5 of their "Jurisdictional Statement" contend that the testimony of their witnesses

at the Hearing on October 23, 1967, was undisputed. This question is unsubstantial because the Appellees stated on page 30 of the "Transcript of Proceedings" of the Hearing on October 23, 1967, the following:

> "If the Court please, I have sort of a general objection to the testimony of the members of the General Assembly, which I think is best illustrated by the testimony we have received from Mr. Rabbitt.
>
> "In a sense, the testimony of these individuals is self-serving, not only to himself, to his political party, to his political faction, political area and also his political career.
>
> "This is not an ordinary bill. This is one in which we have a lot of controversy. The mere fact that there might be bi-partisan agreement does not cure the possible bias and prejudice of some of the individuals. We do not know what their testimony is. We do not know what they did in their own minds to get them finally to vote upon this.
>
> "There is also the question of separation of power here, the conduct of the legislature, how they behave, what is in the minds of these various people as they make up a bill, is not something that this Court should really inquire into, and there are no records of the committee, which I think is brought out; there is no record of the floor debate.
>
> "There is no possible way to determine the reasons nor the motives of these legislators, whether they were population-motivated or whether they had other motivation, and we could bring in 163 plus the 34 members of the Senate and still this Court could not get necessarily what was on their minds when they voted for that bill, and I feel the Court will ultimately have to judge, at least in my opinion, and I think in the opinions that you find in some of the other courts, on the actual result of what they pro-

duced, not upon how it got there, and therefore I feel that much of this testimony, an example of what we have gotten so far, will merely give an idea what went on in the Legislature and a degree of speculation."

and continuing the Appellees' objections on page 70,

"Your Honor, in view of my previous statement that I felt the witnesses should be excluded entirely as being unnecessary, in view of the fact that the map that is documentary evidence and the various other matters of which the Court might take judicial notice, plaintiffs will not call any witnesses."

Appellees served notice that certain witnesses might be called but elected not to do so for the above stated objections and reasons.

CONCLUSION.

Appellees pray the Court to affirm the judgment sought to be reviewed on appeal on the ground that it is manifest that the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,

PAUL W. PREISLER,
4274 Shenandoah Avenue,
Saint Louis, Missouri 63110,
Attorney for Appellees.

The Congressional Representative Districts of Missouri Created by the 1967 Redistricting Act.

The official district population data prepared by the Bureau of the Census (Item 13 of "Stipulation of Evidence") is as follows:

District	Population	District	Population
1	439,746	6	422,238
2	436,448	7	436,769
3	436,099	8	445,523
4	419,721	9	428,223
5	431,178	10	423,868

State total population: 4,319,813

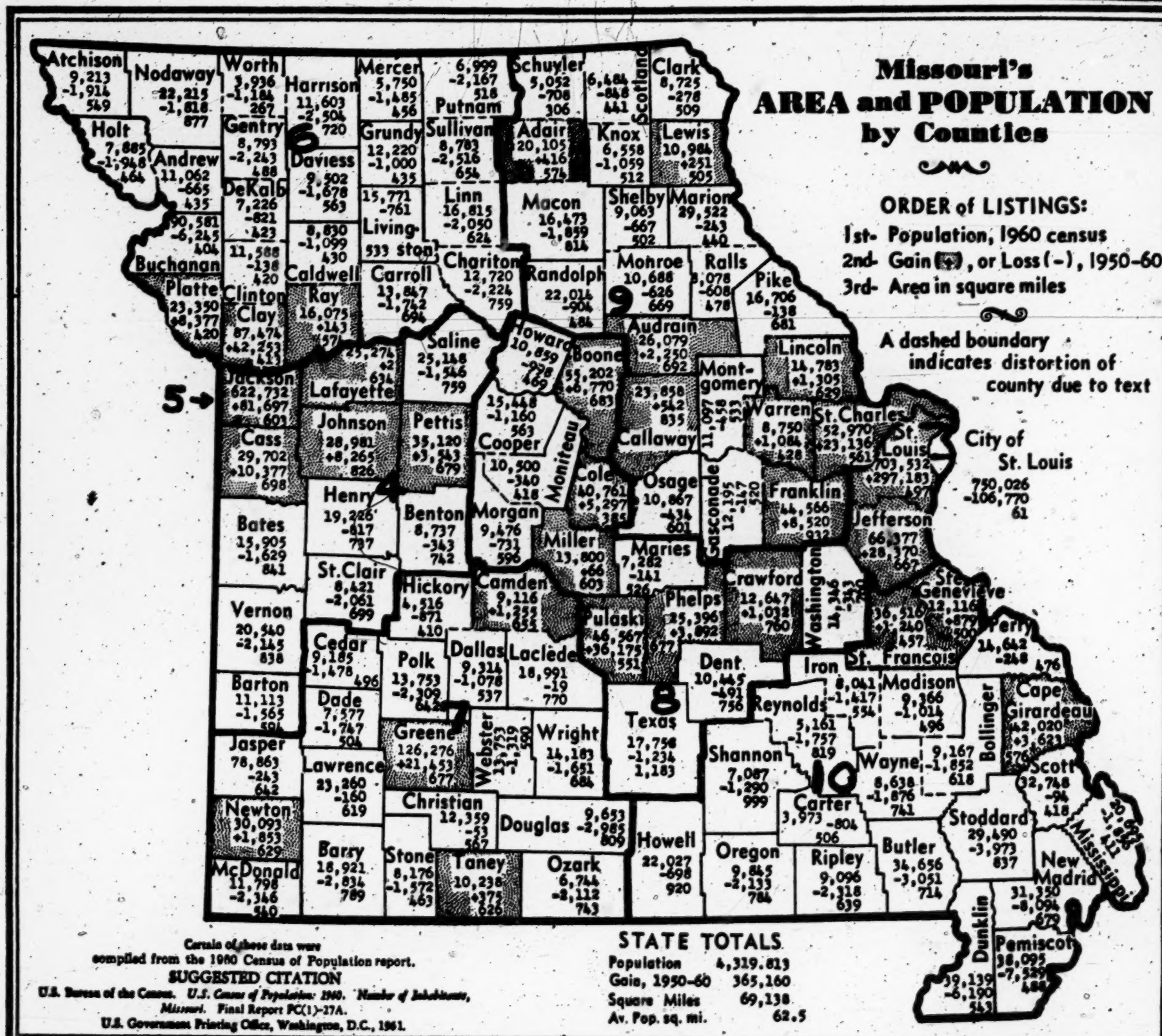
District average population: 431,981

The City of St. Louis (a city not within a county) contains a part of District 1 and a part of District 3.

The County of St. Louis contains all of District 2 and a part of each of Districts 1, 3, 8, and 9.

Jackson County contains all of District 5 and a part of District 4.

Kansas City contains all of District 5 and a part of District 4.


Missouri's
AREA and POPULATION
by Counties
ORDER of LISTINGS:
1st- Population, 1960 census
2nd- Gain (+), or Loss (-), 1950-60
3rd- Area in square miles
A dashed boundary indicates distortion of county due to text
City of St. Louis
750,026
-106,770
61
Atchison 9,213 -1,914 549
Nodaway 22,215 -1,818 877
Worth 3,936 -1,184 267
Harrison 11,603 -2,504 720
Mercer 5,750 -1,485 456
6,999 -2,167 518
Putnam
Schuyler 5,052 -708 306
6,484 -848 441
Scotland
Clark 8,725 -278 509
Holt 7,885 -1,948 464
Gentry 8,793 -2,243 488
Grundy 12,220 -1,000 435
Sullivan 8,783 -2,516 654
Adair 20,105 +416 574
Knox 6,558 -1,059 512
Lewis 10,984 +251 505
Andrew 11,062 -665 435
Daviess 9,302 -1,678 563
DeKalb 7,226 -821 423
15,771 -761
Linn 16,815 -2,050 624
Macon 16,473 -1,859 814
Shelby 9,063 -667 502
Marion 29,522 -243 442
90,581 -6,245 404
8,830 -1,099 430
Living-ston
Buchanan
11,588 -136 420
Caldwell
Carroll 13,847 -1,742 694
Chariton 12,720 -2,224 759
Randolph 22,014 -904 484
Monroe 10,688 -626 669
Ralls 8,078 -608 478
Pike 16,706 -138 681
Platte 23,350 +8,377 420
Clinton 11,677 +143 571
Clay 87,474 +42,253 413
Ray 16,075 +143 574
Saline 25,148 -1,546 759
Howard 10,859 -928 469
Boone 55,202 +6,770 683
Audrain 26,079 +2,250 692
Lincoln 14,783 +1,305 629
Jackson 622,732 +81,697 603
25,274 +2 634
Lafayette
15,448 -1,160 563
Cooper
Moniteau
23,858 +542 835
Callaway
Mont-gomery 11,097 +558 533
Warren 8,750 +1,084 428
St. Charles 52,970 +23,136 561
St. Louis 703,532 +297,183 497
Cass 29,702 +10,377 698
Johnson 28,981 +8,265 826
Pettis 35,120 +3,543 679
10,500 -340 418
Cole 40,761 +5,297 385
Osage 10,867 -434 601
Gasconade 12,195 -147 520
Franklin 44,566 +8,520 932
Jefferson 66,377 +28,370 667
Henry 19,226 -817 737
Benton 8,737 -343 742
Morgan 9,476 -731 596
Miller 13,800 +66 603
Maries 7,282 -141 526
Bates 15,905 -1,629 841
St. Clair 8,421 -2,061 699
Hickory 4,516 -871 410
Camden 9,116 +1,255 651
Crawford 12,647 +1,032 760
Washington 14,340 +1,342 478
Ste. Genevieve 12,116 +879 500
36,516 +1,240 457
Perry 14,642 -248 476
Vernon 20,540 -2,145 838
Cedar 9,185 -1,478 496
Polk 13,753 -2,309 642
Dallas 9,314 -1,078 537
Laclede 18,991 -19 770
Pulaski 46,567 +36,175 551
Phelps 25,396 +3,892 677
Dent 10,445 -491 756
Iron 8,041 -1,417 554
St. Francois
Madison 9,366 -1,014 496
Barton 11,113 -1,565 594
Dade 7,577 -1,747 504
Texas 17,756 -1,234 1,183
Reynolds 5,161 -1,757 819
Bollinger
Cape Girardeau 42,020 +3,623 578
Jasper 78,863 -243 642
Greene 126,276 +21,453 677
Webster 15,753 +1,319 590
Wright 14,183 -1,651 684
Shannon 7,087 -1,290 999
Wayne 8,638 -1,876 741
9,167 -1,852 618
Scott 32,748 -94 418
Lawrence 23,260 -160 619
Christian 12,359 -53 567
Douglas 9,653 -2,985 809
Carter 3,973 -804 506
Stoddard 29,490 -3,973 837
30,693 -1,641
Mississippi
Newton 30,093 +1,853 629
Barry 18,921 -2,834 789
Stone 8,176 -1,572 463
Taney 10,238 +375 626
Ozark 6,744 -2,112 743
Howell 22,027 -898 920
Oregon 9,845 -2,133 784
Ripley 9,096 -2,318 639
Butler 34,656 -3,051 714
New Madrid 31,350 -8,094 679
McDonald 11,798 -2,346 540
Dunklin
Pemiscot 38,095 -7,529 486
39,139 -6,190 543
Certain of these data were compiled from the 1960 Census of Population report.
SUGGESTED CITATION
U.S. Bureau of the Census. U.S. Census of Population: 1960. Number of Inhabitants, Missouri. Final Report PC(1)-27A.
U.S. Government Printing Office, Washington, D.C., 1961.
STATE TOTALS
Population 4,319,813
Gain, 1950-60 365,160
Square Miles 69,138
Av. Pop. sq. mi. 62.5